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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 800

DANIEL D. LYNCH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

Your Petitioner, Daniel D. Lynch, respectfully represents that he is aggrieved by the final judgment of the United States Court of Appeals for the Seventh Circuit, entered on April 8, 1950 (R. 204), affirming the judgment of the District Court of the United States for the Northern District of Indiana, South Bend Division (R. 181), entered on the verdict of a jury finding Petitioner guilty as to Counts 1 and 12 of the indictment (R. 2, 9).

A.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

On April 28, 1949 Petitioner was named in an indictment of 13 counts which charged offenses under the Bankruptcy Act and also under the Bankruptcy sections of the new Criminal Code (R. 2-11). Before trial, the government dismissed count 2 of the indictment (R. 14). On a plea of not guilty (R. 13) the issues were submitted to a jury on September 12, 1949 and on the 14th day of September, 1949, the jury returned a verdict finding the defendant not guilty as to counts 3, 11 and 13 of the indictment and guilty as to counts 1, 4, 5, 6, 7, 8, 9, 10 and 12 of the indictment (R. 180). On October 4, 1949, judgment was entered on said verdict and the defendant was sentenced to imprisonment on count 1 for a period of one year and one day and the sentence on the remaining counts was suspended and in lieu thereof the defendant was placed on probation for a period of three years, beginning at the time he is released from institutional custody and must make restitution in the sum of $6,200.00 (R. 181, 182).

Upon appeal to the United States Court of Appeals for the Seventh Circuit, the judgment as to counts 1 and 12 was affirmed and as to counts 4, 5, 6, 7, 8, 9 and 10 was reversed. The judgment of said court was entered on March 7, 1950 (R. 204) and Petition for Rehearing was denied on April 8, 1950 (R. 205).

Count 1 charged, in substance, that the defendant knowingly and fraudulently appropriated to his own use property in the form of money belonging to the estate of a bankrupt which came into his charge as agent of the debtor

in possession by writing and cashing checks in 1948 in the sum of $4,200.00 (R. 2).

Count 12 of the indictment charged, in substance, that the defendant on September 17, 1948 did knowingly and fraudulently make a false oath to a final report filed in the Bankruptcy Court to the effect that he had received $5,897.20 in cash, whereas, he had received $7,159.70 in cash which was a matter and thing material for the court to be informed and to know (R. 9).

B.

STATEMENT OF THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVERSE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The jurisdiction of this Court to grant a Petition for a writ of certiorari is invoked under Section 1254 of the Judicial Code, as amended by the Act of September 1, 1948 (28 U. S. C. 1254).

The time for filing this Petition for a writ of certiorari begins from the date of the final decision, to-wit, April 8, 1950 (R. 205).

The indictment filed in the United States District Court for the Northern District of Indiana, South Bend Division, charged offenses under Title 11 and Title 18 of the United States Code and this Petition is brought to review the procedure and record in the Courts of the United States.

Although the decision of said Court of Appeals, in the portion of the opinion which reversed the judgment of conviction on Counts 4-10 inclusive (R. 200-202), found that

"fraudulently" was an essential element which had not been proved as to said counts and thereby properly recognized the decisions of other courts of appeal, it improperly and erroneously failed to apply said decisions of the other courts in the portion of the opinion which affirmed the judgment of conviction as to Counts 1 and 12 in that it failed to find that "fraudulently" was an essential element to be proved by positive evidence of acts of deliberate deception constituting affirmative positive fraud.

Title 11 U. S. C. 52 (a) and 52 (b) (2) repealed Act of June 25, 1948, c. 645 para. 21, 62 Statute 862 effective September 1, 1948.

Title 18 U. S. C. 152 effective September 1, 1948.

Although the court (R. 199) recognized the substantial evidence rule as announced by this Court, it applied said rule in a manner conflicting with the decisions of Courts of Appeal of other circuits, so that this Petition presents an important question as to the administration of the law of criminal procedure.

This Court should exercise its jurisdiction by granting this Petition to determine a principle of fundamental law concerning false oaths in bankruptcy and perjury in general, as the opinion of the Court of Appeals (R. 199), in effect, held that the falsity need not be fraudulent, need not be concerning a material matter and need not be supported by evidence from which the jury could infer that the defendant did not believe the report subscribed under oath, to be true at the time the oath was made.

Petitioner asserts that there is a conflict between the decision of said Court of Appeals and the decision of other Courts of Appeal, which said other courts have held that unless there is substantial evidence of fact which excludes every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for

the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction.

C.

THE QUESTIONS PRESENTED.

The questions presented have been stated in the preceding section and may be summarized as follows:

Whether proof of positive acts of deliberate deception constituting affirmative positive fraud is essential to the proof of knowingly and fraudulently appropriating property to the Petitioner's use.

Whether the substantial evidence rule was applied properly.

Whether materiality and proof that the defendant did not believe the matter subscribed to be true at the time of the oath is essential to proof of false oath in bankruptcy as well as in perjury generally.

Whether it is the duty of an Appellate Court to affirm where there is substantial evidence of facts which do not exclude every other hypothesis but that of guilt.

D.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Court of Appeals in this case conflicts with the decisions of this Court, and of other Courts of Appeal.

The applicable decisions of this Court have not been properly applied.

Important questions of federal law which have not been, but should be settled by this Court, are presented.

The Court has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

The Court has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

There is serious doubt as to the correctness of the judgment that the Petitioner was guilty.

Wherefore, Petitioner prays that a writ of certiorari issue.

Respectfully submitted,

DANIEL D. LYNCH,
Petitioner,
By C. BALLARD HARRISON,
Counsel for Petitioner.

5404 Hohman Avenue,
Hammond, Indiana.

IN THE

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OCTOBER TERM, 1949.

No. .....

DANIEL D. LYNCH,
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vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

REPORT OF OPINION.

The opinion of the Court of Appeals (R. 196) is reported in ..... Fed. 2d .....

II.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The grounds are more particularly set forth in Paragraph B of the preceding Petition.

III.

STATEMENT OF THE CASE.

The issues are set forth in Paragraph A of the preceding Petition.

Count 1.

The opinion recites (R. 199) that the Petitioner, as secretary of the Hoosier State Paper Mills, Inc. of South Bend, Indiana, operated said corporation while it was in possession of the United States District Court for the Northern District of Indiana, South Bend Division, for the purpose of reorganization under Chapter X of the Bankruptcy Act.

Petitioner drew checks payable to himself for his salary at $62.50 per week for 28 weeks (R. 200). In addition thereto, he drew other checks, payable to himself and indorsed by himself and either cashed or deposited in his personal banking account, for sums substantially in excess of his salary and expenses. After all expenses that he could prove were claimed, there remained a substantial amount which he promised to repay but failed to do so (R. 200). In addition, there were substantial amounts which were properly identified as petty cash items for which he could not produce supporting vouchers.

Count 12.

He prepared a report which was incomplete and erroneous in many respects (R. 161-163). During the possession, he had two bank accounts: one for general receipts and expenditures and one for payroll. The report showed transfers from the general account to the payroll account but did not list the detail of some 600 payroll checks—among

which were checks s totalling $1,250.00 payable to himself at the rate of $62.5 .50 per week (R. 48, 49). The report purported to summa narize the amount that he had received and did not include t the $1,250.00, although it did show the full amount of his s salary (R. 162). In his comments on the report and in th he report itself he referred to missing cancelled checks and nd requested the privilege of filing a supplemental report rt as he was attempting to locate the discrepancy (R. 162- 2-163). The report was signed and bears the certificate of the e notary public that it was subscribed and sworn to before e her (R. 163).

The government's 's chief witness, an expert F. B. I. accountant, testified th hat the defendant took credit only once for the $1,250.00 (R (R. 56). The defendant admitted, on cross-examination, t that he took credit for $1,250.00 twice in the report (R. 137 37).

IV.

SPECIFICATION N OF ERRORS ASSIGNED AND INTEN NDED TO BE URGED.

The Court of App ppeals erred in the following:

1. It affirmed the e judgment of the District Court as to Counts 1 and 12 (R. R. 204).

2. It held that th there is no merit to an argument that for an act to be fr fraudulent in a bankruptcy proceeding there must be eviden nce of positive acts of intentional fraud (R. 199).

3. It held that th there is no merit in the argument that the mere fact that P Petitioner issued and cashed the checks was no evidence tha hat he committed any positive acts of deliberate deception n which amounted to affirmative positive fraud (R. 199).

4. It held that whether the evidence was equally consistent with innocence or guilt, was a matter exclusively for the jury (R. 199).

5. It recited that defendant was ordered to pay the amount of $4,236.54 to the bankrupt and that he did not comply with the order of court, (R. 200) and held that such was evidence to support the verdict on the indictment which charged Petitioner with writing and cashing checks drawn on a bank and thereby knowingly and fraudulently appropriating to his own use the sum of $4,200.00 (R. 200).

6. It held that proof of false oath in bankruptcy need not contain all of the elements of perjury (R. 202).

7. It held that if Petitioner's report was knowingly false at the time he made it, the crime charged had been completed (R. 202).

8. It apparently held that the Petitioner's opinion that he took credit for $1,250.00 twice in his report was substantial evidence which controlled over the report itself and over the testimony of the government's expert witness to the contrary (R. 202).

9. It held that in the report Petitioner represented that he had expended in advancements to himself $5,897.20; whereas, the report claimed that $2,840.50 of this was salary and reimbursement of expenses (R. 203).

10. It held that there was evidence that the bank funds he advanced to himself were actually $7,159.70 (R. 203); whereas, the evidence was that his payroll and other undisputed reimbursements were $3,745.79 (R. 55).

11. It held that there was evidence that the report was false and that it set up a total shortage in his account of $6,823.93 (R. 203), whereas said figure did not appear in the report at all but was included in a supplemental report filed later which included amounts not charged in Count 12 of the indictment (R. 38).

12. Notwithstanding the errors set forth in specifications 6 to 10, inclusive, it held that under such circumstances it was for the jury to determine whether Petitioner knowingly and fraudulently made a false oath in his report (R. 203).

13. It announced a decision in conflict with the decisions of other circuits.

14. The applicable decisions of this Court have not been applied.

15. It departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court.

16. It held that "Defendant accepted such employment and became the agent of the debtor in possession" (R. 199) and thereby approved the erroneous instruction of the court as follows:

> "When a person is appointed agent of a debtor in possession in bankruptcy proceedings in a United States District Court pursuant to the Bankruptcy Laws of the United States of America, he becomes an officer of the Court" (R. 154).

V.

ARGUMENT.

A.

The Judgment and Opinion of the Court of Appeals Departs From the Controlling Decisions of This Court Concerning Nature and Proof of Criminal Fraud Under the Bankruptcy Act.

It is not a crime under the former penal section of the Bankruptcy Law or under the new Criminal Code for an officer of a Debtor in Possession under Chapter X of the Bankruptcy Act to knowingly oppropriate assets of the bankruptcy estate in the form of deposits in a bank because the Act contemplates that retaining the debtor in possession authorizes appropriation of funds for legitimate purposes such as the purchase of material and for payroll. When the Petitioner drew payroll checks to himself, he appropriated property to his own use knowingly and yet committed no offense. However, the substantial evidence shows that the Petitioner drew and presented checks payable to himself in excess of authorized expenditures. Such was not an offense under said laws because it was not made or done "fraudulently."

Title 11 U. S. C. 52(a) and 52(b). (Repealed.)
Title 18 U. S. C. 152.

The trial court instructed the jury in part as follows:

> "To do an act knowingly and fraudulently comes within the following definitions:
>
> For an act to be knowingly done it must be with a knowledge of the actual facts and it must be done intentionally.

> For an act to be fraudulently done it must be done in a manner proceeding from, or characterized by an act of deliberate deception practiced with the object of having a person believe something which is not the fact to the prejudice of another" (R. 155).

This instruction is the law of the case and is consistent with the applicable decisions of this Court.

Farrar v. *Churchill,* 135 U. S. 609.

The instruction is also consistent with the long established decisions of this Court that fraud in bankruptcy is affirmative positive fraud as distinguished from the equitable doctrine, not applicable to criminal offenses, of implied or constructive fraud.

Neal v. *Scruggs, Neal* v. *Clark,* 95 U. S. 704.
Tinker v. *Colwell,* 193 U. S. 473.
6 Am. Jur., Bankruptcy, para. 511.

The Court of Appeals, however, summarily dismissed argument made upon this instruction by stating:

> "There is no merit to such an argument" (R. 199).

A series of many separate offenses was charged in Count 1 of the indictment (R. 2) and the failure to repay the money months later is not evidence of an act or acts of deliberate deception, practiced with the object of having a person believe something which is not the fact to the prejudice of another.

B.

The Decision of the Court of Appeals Conflicts With the Applicable Decisions of This Court Pertaining to the Rule of Substantial Evidence.

The said Court recognized the rule of substantial evidence:

> "And the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (R. 199.)
>
> *Glasser* v. *United States,* 315 U. S. 60, 80.

The evidence has been stated in Part III of this brief. There was no evidence of any acts of deliberate deception amounting to affirmative positive fraud as the checks were signed by the defendant, made payable to himself and cashed by himself or deposited in his personal bank account.

The Court's recitation of the evidence (R. 200-203) is erroneous as recited in specifications 5, 8, 9, and 10 of Part IV of this brief.

Clearly acts of appropriation were complete upon cashing or depositing the checks. The failure to repay clearly is not a substantial element of the offense charged as it came months afterwards. If the defendant should repay within the next three years, that would be no more a defense than failure to repay at the time his supplemental report was filed in November, 1948. It is the same as recanting after perjury.

Petitioner wasn't charged in the indictment (R. 2) with failure to repay and the consideration of such in the absence of proof of acts of deliberate deception is a violation of the decision of this Court in *Glasser* v. *United States,* 315 U. S. 60, 80.

Likewise, as to Count 12, the substantial evidence, the report itself (R. 161-163) shows on its face that the error wasn't intentional and that it was immaterial and yet the Court of Appeals in violation of the substantial evidence rule relied upon the erroneous opinion of the petitioner on cross-examination (R. 137) as substantial evidence rather than upon the correct testimony of the Government's expert witness (R. 56) and the report itself (R. 161-163).

C.

The Decision of Said Court of Appeals That Knowingly and Fraudulently Making a False Oath in Bankruptcy is Not Perjury Conflicts With the Decision of Courts of Appeal of Other Circuits.

It is well established in Courts of Appeal of other circuits that a false oath in bankruptcy must contain all the elements of perjury at common law, namely, an intentional untruth in a matter material to an issue which is itself material.

Willoughby v. *Jamison,* 103 F. 2d 821 (C. C. A. 8).
Aronossky v. *Bostian,* 133 F. 2d 290 (C. C. A. 8).
In re Lovich, 117 F. 2d 612, 133 A. L. R. 673 (C. C. A. 2).
Humphries v. *Malley,* 269 F. 607 (C. C. A. 5).

However, said Court of Appeals for the Seventh Circuit held that proof of false oath in bankruptcy need not contain all of the elements of perjury and if defendant's report was knowingly false at the time he made it, the crime charged had been completed (R. 202).

Although this Court did not decide whether every false oath in bankruptcy is perjury, it did announce, in the case before it, that the particular indictment was broad enough to charge subornation of perjury under the general statute as well as false oath under the Bankruptcy Statute.

Hammer v. *U. S.,* 271 U. S. 620, 625, 626.

The indictment alleged:

> "4. In the matters and things set forth above respecting which the said defendant knowingly and fraudulently made a false oath, was a matter and thing material for the court to be informed and to know." (R. 10.)

The opinion of said Court of Appeals inferentially brushes aside any contention that falsity must be as to a material matter and thereby departs from the decisions of the three other Courts of Appeal. It was demonstrated to the Court of Appeals that the matter was immaterial because of an increase in the amount of money received by the Petitioner personally would be offset by corresponding decrease in the net amount of the over-all liability of the Petitioner as shown by the last figure of R. 161. If the figure of $5,897.20 was increased by $1,250.00, the figure of $1,474.46 would have been decreased by said sum and the net result would have been the same and hence the error could not have been substantially material.

D.

The Decision of Said Court of Appeals That "Whether the Evidence Was Equally Consistent With Innocence or Guilt is a Matter Exclusively for the Jury", is in Conflict With Decisions of the Courts of the Third, Eighth and District of Columbia Circuits.

The correct rule has been stated that:

> "Unless there is *substantial* evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction."

Paul v. *U. S.*, 79 F. 2d 561 (C. C. A. 3).
Isbell v. *U. S.*, 227 F. 788, 792 (C. C. A. 8).
Hammond v. *U. S.*, 127 F. 2d 752, 753 (C. C. A. D. C.).

This Court announced:

> "Whether the evidence was equally consistent with innocence or guilt is a matter exclusively for the jury." (R. 199.)

The application of this erroneous rule to both Counts 1 and 12, coupled with a recitation of the evidence, even in the light most favorable to the Government, which is erroneous and of no probative value, substantially prejudiced the Petitioner that this Court, in its jurisdiction under Title 28, Section 2111, should examine the record and grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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